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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

v.

JANET PALMA,

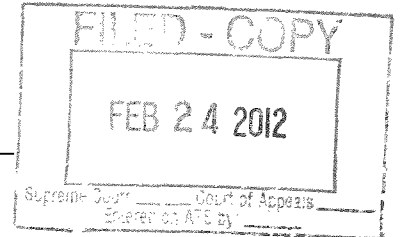
Defendant-Appellant.

S. Ct. No. 39276-2011

APPELLANT'S BRIEF

Appeal from the District Court of the Seventh
Judicial District of the State of Idaho, in and
For the County of Bingham.

Honorable Darren B. Simpson
District Judge



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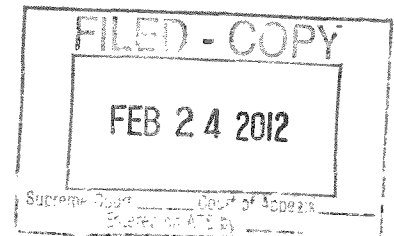


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STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the denial of a motion pursuant to Idaho Code § 19-2604 to amend the judgment of felony conviction to a misdemeanor conviction. Clerk's Record ("CR") 63.

B. Procedural History and Statement of Facts.

On March 26, 1996, defendant-appellant Janet Palma (hereinafter "Ms. Palma") was arrested and charged with forgery, a felony, in violation of Idaho Code § 18-3601. CR 4, 5. In connection therewith, Ms. Palma was appointed counsel by the Court, public defender Daniel R. Acevedo of Bingham County. CR 9. However, on May 14, 1996, Jay A. Kohler (hereinafter "Mr. Kohler") was hired by Ms. Palma and was substituted as counsel of record in place of Mr. Acevedo. CR 17.

On November, 18, 1996, with Mr. Kohler as counsel, Ms. Palma was convicted of the forgery charge. CR 30. The Court imposed a suspended sentence and Ms. Palma was placed on probation for a period of three (3) years. CR 31. As a condition of her probation, Ms. Palma was required to pay restitution and other fees in the sum of \$753.00. CR 33. Other conditions of her probation included completion of community service and obtaining a GED or graduating from High School. CR 33, 34. Ms. Palma subsequently was allowed to move to Arizona and transfer her probation supervision via the Interstate Compact Service. CR 38.

Approximately three (3) years after sentencing, the Court received a Case-End Summary/Request for Discharge from Ms. Palma's probation officer in Arizona (dated November 13, 1999). CR 38. The request informed the Court that Ms. Palma had complied with various conditions of probation including paying all fines, restitution, and costs in full. CR 38. However, Ms. Palma had not completed the required community service and failed to obtain her

GED. CR 38. The probation officer, therefore, requested that Ms. Palma be granted an unsatisfactory discharge from probation. CR 38. Based solely upon the request of the probation officer and without notice or opportunity to appear given to Ms. Palma, Seventh Judicial District Judge James Herndon issued an Order of Discharge (hereinafter “the Order”) on December 2, 1999. CR 39. In the Order, the Court found that Ms. Palma had unsatisfactorily complied with probation and she was discharged and released from probation. CR 39. Furthermore, the Order entered the final judgment in the case as “a felony conviction.” CR 39.

Subsequently, a notice of the Order was sent to the following locations:

- Department of Corrections, Central Records, 1299 North Orchard, Suite 110, Boise, ID 83706
- Carter R. Mackley, Esq., (designated courthouse box)
- Cindy L. Campbell, Esq., (designated courthouse box)
- Department of Correction, Field and Community Services, (designated courthouse box)

CR 40. No notice was sent to Ms. Palma living in Arizona nor was notice sent to her attorney of record, Mr. Kohler. Apparently, the Order was sent to Cindy L. Campbell (hereinafter “Ms. Campbell”) because more than a year after sentencing on May 26, 1998, a substitution of counsel was recorded in Bingham County introducing Ms. Campbell as Ms. Palma’s attorney of record. CR 37. Said substitution states that Valerie J. Phillips (hereinafter “Ms. Phillips”) was Ms. Palma’s attorney of record being substituted by Ms. Campbell. CR 37. However, there is no record indicating Mr. Kohler was ever substituted by Ms. Phillips, Ms. Campbell, or anyone else for that matter. In fact, there is no record indicating that Ms. Phillips was involved in this case in anyway. As discussed above, a public defender, Daniel Acevedo, was originally appointed to serve as Ms. Palma’s counsel but he was properly substituted by Mr. Kohler in May 1996. See

CR 9, 17. After that date, Mr. Kohler never withdrew or was substituted as representation of Ms. Palma.

On May 3, 2011, Mr. Kohler, with the understanding that he was counsel of record filed a Motion for Amended Judgment of Conviction. CR 43. The Motion states that Ms. Palma believed that she successfully completed probation and was satisfactorily discharged. CR 43. On May 10, 2011, the Motion was amended to request that the felony conviction be changed to a misdemeanor on the grounds that Ms. Palma was never charged with a probation violation. CR 47. The relief was requested pursuant to Idaho Code § 19-2604. See CR 51-62.

On August 30, 2011, District Court Judge Darren Simpson ruled on the Motion to Amend holding that Ms. Palma waived her right to seek amendment of the Judgment by failing to appeal the Discharge Order.

ISSUES ON APPEAL

1) Whether the District Court, Judge James C. Herndon presiding, erred in not providing Ms. Palma notice and a hearing before entering an Order of Discharge from probation and a felony conviction.

2) Whether the District Court erred in holding that Ms. Palma waived her right to seek an amendment by failing to appeal the Order of Discharge and entry of felony conviction.

STANDARD OF REVIEW

The denial of a motion to amend a judgment of conviction pursuant to I.C. § 19-2604 rests within the discretion of the district court. *State v. Wiedmeier*, 121 Idaho 189, 191, 824 P.2d 120, 122 (1992); *Housley v. State*, 119 Idaho 885, 887, 811 P.2d 495, 497 (Ct. App. 1991). When a trial court's discretionary decision in a criminal case is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the

issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *State v. Shock*, 133 Idaho 753, 754, 992, P.2d 202, 203 (Ct. App. 1995); *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

ARGUMENT

Ms. Palma had a constitutional right to a notice and a hearing before deprivation of a liberty interest. The District Court did not provide sufficient notice or a hearing before entered an unsatisfactory discharge from probation and felony conviction. Therefore, the District Court deprived Ms. Palma of a significant constitutional right.

In addition, the District Court erred when it ruled that Ms. Palma waived her right to seek an amendment of the Order of Discharge and felony conviction by failing to make a timely appeal. Ms. Palma was not given actual or constructive notice of the Order of Discharge or felony conviction. Furthermore, “the court did not find, and [Ms. Palma] did not admit, in any probation violation proceeding that [she] violated any of the terms or conditions of probation.” See I.C. §19-2604(1). Therefore, Ms. Palma’s application for an amendment to the Order of Discharge was timely, and with significant merit to justify an amendment from a felony conviction to a misdemeanor conviction.

I. THE DISTRICT COURT ERRED IN NOT PROVIDING MS. PALMA A HEARING AND AN OPPORTUNITY TO BE HEARD BEFORE ENTERING THE ORDER OF DISCHARGE AND FELONY CONVICTION.

Ms. Palma’s Fourteenth Amendment right to fair process, i.e. hearing and an opportunity to be heard, was violated when District Court Judge Herndon entered an Order of Discharge based solely on a probation officers recommendation. The Fourteenth Amendment guarantees the constitutional right to Due Process before depravation of a liberty interest; “nor shall any

State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend.XIV. Generally an individual is given a hearing before a probation discharge is entered. In *State v. Thompson*, a probation officer filed a motion to revoke the defendant’s probation. 140 Idaho 796, 102 P.3d 1115 (2004). The defendant was granted an opportunity to appear and be heard at a revocation hearing. *Id.* at 797. Such practice was not followed in this case and as a result, Ms. Palma’s due process rights were violated. Judge Herndon’s Order was entered *sua sponte* after Ms. Palma’s probation officer sent a Case-End Summary/Request for Discharge. Ms. Palma received no notice of either the Case-End Summary or the subsequent Order. More importantly, Ms. Palma was not given an opportunity to appear and present evidence, or argument against the judgment of felony conviction entered against her. In reviewing the Motion to Amend the District Court acknowledged that “[t]he record does not reflect that a hearing was held on the probation officer’s Case-End Summary.” CR 69 The Case-End Summary stated that Ms. Palma had unsatisfactorily complied with probation. CR 38. This letter, send on November 13, 1999, was recorded by the Court on December 2, 1999 and the Order of Discharge was entered on the same day. CR 38. The District Court took the probation officer’s Case-End Summary as gospel and entered a judgment. Therefore, because Ms. Palma had no opportunity to appear and be heard, her constitutional right to due process was violated.

II. THE DISTRICT COURT ERRED IN HOLDING THAT MS. PALMA WAIVED HER RIGHT TO SEEK AN AMENDMENT BY FAILING TO APPEAL THE ORDER OF DISCHARGE AND ENTRY OF FELONY CONVICTION.

Ms. Palma appropriately has sought an amendment of an Order of Discharge and felony conviction under I.C. § 19-2604. Her motion to amend was timely in light of the fact that she was not given actual or constructive notice of the Order and felony conviction. Additionally, “[t]he court did not find, and [Ms. Palma] did not admit, in any probation violation proceeding that [she] violated any of the terms or conditions of probation.” I.C. § 19-2604(1). Therefore, the

District Court erred in finding that Ms. Palma waived her right to amend her felony conviction to a misdemeanor conviction under I.C. § 19-2604.

Idaho Code Section 19-2604(1) creates a procedure whereby a successful probationer who has been convicted of a felony can request the district court to amend the judgment so that the harsh consequences of a felony record can be avoided. *Housley v. State*, 119 Idaho 885, 890, 811 P.2d 495, 500 (Ct. App. 1991). Specifically, Idaho Code Section 19-2604(1) provides:

- (1) If sentence has been imposed but suspended, or if sentence has been withheld, upon application of the defendant and upon satisfactory showing that:
 - a. *The court did not find, and the defendant did not admit, in any probation violation proceeding that the defendant violated any of the terms or conditions of probation; . . .*
the court may, if convinced by the showing made that there is no longer cause for continuing the period of probation, and if it be compatible with the public interest, terminate the sentence or set aside the plea of guilty or conviction of the defendant, and finally dismiss the case and discharge the defendant or may amend the judgment of conviction from a term in the custody of the state board of correction to “confinement in a penal facility” for the number of days served prior to suspension, and the amended judgment may be deemed to be a misdemeanor conviction. This shall apply to the cases in which defendants have been convicted and granted probation by the court before this law goes into effect, as well as to cases which arise thereafter. The final dismissal of the case as herein provided shall have the effect of restoring the defendant to his civil rights. (Emphasis added).

In this case, Ms. Palma was sentenced to a fixed and determinate term of one (1) year, together with an indeterminate period of two (2) years. The sentence was suspended and she was placed on probation. Therefore, Ms. Palma falls within the purview of subsection (1) of Idaho Code § 19-2604.

- A. Idaho Code § 19-2604(1) applies to Ms. Palma and the Court did not find, and Ms. Palma did not admit, in any probation violation proceeding that she violated any of the terms or conditions of probation. Therefore, the District Court was empowered to exercise its discretion on whether to grant the Motion to Amend.

Prior to the legislative amendment to I.C. § 19-2604(1), to have a judgment amended, a defendant was required to prove that he “ha[d] at all times complied with the terms and

conditions upon which he was placed on probation.” *See* I.C. § 19-2604(1)(2010). A formal probation violation was not required and the phrase “at all times complied with the terms and conditions upon which he was placed on probation” was interpreted strictly. *See State v. Thompson*, 140 Idaho 796, 102 P.3d 1115 (2004); *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003). However, as amended in 2011, the only prerequisites a defendant must show before “the court may amend the judgment of conviction” are that “[t]he court did not find, and the defendant did not admit, in any probation violation proceeding that the defendant violated any of the terms or conditions of probation.” *See* I.C. § 19-2604(1)(2011). When these prerequisites are satisfied, the district court may exercise its discretion in determining whether or not to grant the motion for amendment. *State v. Shock*, 133 Idaho 753, 755, 922 P.2d 202, 204 (Ct. App. 1999). It is important to note that the opportunity to apply for an amended judgment under the new standard does not only apply to new offenses or judgments, but also “shall apply to the cases in which the defendants have been convicted and granted probation by the court before this law goes into effect.” I.C. § 19-2604(1).

Applying the facts of Ms. Palma’s case to the 2011 version of I.C. § 19-2604(1) reveals that she can satisfy the prerequisites, thereby empowering the District Court to exercise its discretion. Indeed, the Court did not actually find, nor did Ms. Palma admit, that she had violated her conditions of probation. The only evidence that Ms. Palma violated a condition of probation is set forth in the Case-End Summary/Request for Discharge (hereinafter “Case-End Summary”) provided by her probation officer. CR 38. In the Case-End Summary, the probation officer states that Ms. Palma met some conditions of probation including payment of fines but failed to complete her GED, and fifty (50) hours of Community Service. CR 38. However, Ms. Palma never admitted in a probation violation proceeding that she had violated a condition of probation.

Furthermore, as far as we are aware, the Court never held a probation violation proceeding to determine if there was a probation violation. Therefore, under the new version of I.C. § 19-2604(1), Ms. Palma satisfied the prerequisites to requesting a motion to amend her felony conviction. Accordingly, with the preconditions to I.C. § 19-2604 met it rested within the discretion of the District Court to grant or deny Ms. Palma's Motion to Amend.

B. The District Court did not act within the boundaries of its discretion or with reason when it denied Ms. Palma's Motion to Amend. The Motion was timely as there is no limitation period provided by statute for bringing such a motion. Further, her filing ten (10) years after the Order is justified by the fact that she was not given actual or constructive notice when the Order was entered.

Idaho criminal statutes do not state any limitation period within which a defendant must file a motion under I.C. § 19-2604 to amend a judgment of conviction. *Housley v. State*, 119 Idaho 885, 889-890, 811 P.2d 495, 498-499 (Ct. App. 1991). In *Housley*, a defendant was permitted to apply to have a felony conviction amended to a misdemeanor more than ten (10) years after his discharge from probation in a felony conviction. *Id.*, at 890, 811 P.2d at 500. In that case, the defendant's reasoning for not seeking an amendment under I.C. § 19-2604 for ten (10) years was he had "not suffered any serious collateral consequences as a result of his . . . felony conviction" *Id.*, at 887, 811 P.2d at 497. It was not until he was charged with being a felon in possession of a firearm that he chose to exercise his right to challenge his felony conviction under I.C. § 19-2604. Despite the defendant's postponement, the Court held that "unless the state can show that it has been caused substantial prejudice by [the defendant's] delay . . . in filing his motion under I.C. § 19-2604, the motion must be considered timely." *Id.*

Similar to the defendant in *Housley*, Ms. Palma seeks to amend a judgment of conviction under I.C. § 19-2604 more than ten (10) years after it was ordered. However, unlike the defendant in *Housley*, Ms. Palma's reason for delay in bringing this motion is because of her

failure to receive notice of the Order of Discharge, not because the harsh consequences of an order are now apparent. Ms. Palma was not given notice of her probation officers Case-End Summary/Request for Discharge. Additionally, she was not given actual notice of the Order of Discharge and felony conviction. Furthermore, an apparent clerical error prevented her counsel of record, Mr. Kohler, from receiving notice.

As stated above in the Procedural History and Statement of Facts, Mr. Kohler was the attorney of record throughout Ms. Palma's case. However, in May 1998 the record indicates that Ms. Phillips was substituted by Ms. Campbell as Ms. Palma's attorney of record. CR 37. This substitution of counsel is not only strange in that it was filed during a time when nothing significant was happening in the case, but, even more oddly is how Ms. Phillips became the attorney of record. Indeed, there is no document or record that Mr. Kohler was ever substituted as Ms. Palma's counsel of record. Nor is there any document or record (besides that where Ms. Campbell replaces Ms. Phillips as counsel) which demonstrates that Ms. Campbell or Ms. Phillips had any involvement in this case. Additionally, Mr. Kohler never withdrew from his representation of Ms. Palma. As a result of this apparent error, the Order of Discharge was sent to Ms. Campbell and not Mr. Kohler. Most likely, when Ms. Campbell received a copy of the Order she was just as confused as to how she was involved, as we are. Furthermore, it would have been very difficult for Ms. Campbell to find Ms. Palma in Arizona in order to give her notice of the Order. As a result, Ms. Palma never received actual or constructive notice of the Order of Discharge.

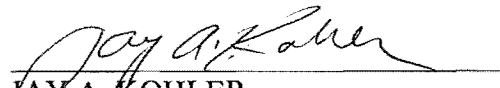
Although it is well established that Ms. Palma's motion is not statutorily barred because of her failure to file sooner, it appears that her delay was the central reasoning used by the District Court in denying her motion. Specifically, the District Court's Order Denying

Defendant's Motion for Amended Judgment of Conviction states "Palma did not object to the Court's finding that she unsatisfactorily complied with all the terms and conditions of her probation. Neither did she seek reconsideration of that finding, request a hearing, or file an appeal." CR 70. In reality, she could not have objected or requested reconsideration to something she and her counsel of record had no knowledge of. The District Court Order further states that "Palma received notice of the Discharge Order, and Palma failed to seek relief therefrom, Palma cannot now seek a second bite at the same apple. CR 70-71. Her failure to appeal the unsatisfactory discharge in the Discharge Order waived her current attempt to amend the Judgment" CR 71. Metaphorically, Ms. Palma was unaware of her need to partake of the fruit until recently and now seeks for the first time to taste of the sweetness that I.C. § 19-2604 offers. Therefore, the District Court unreasonable held that Ms. Palma waived her right to request an amendment to the Order of Discharge and felony conviction.

CONCLUSION

For the foregoing reasons, the defendant-appellant respectfully requests that this court remand and reverse the judgment of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bingham denying Ms. Palma's Motion to Amend Judgment of Conviction.

Respectfully submitted this 22nd day of February, 2012.

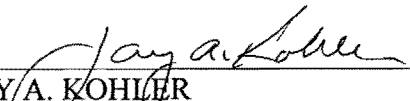

JAY A. KOHLER
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY certify that on the 22 day of February, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF in the above referenced matter by United States Postage paid, and addressed to the following:

Office of the Attorney General
Criminal Appeals Division
P.O. Box 83720
Boise, ID 83720-0010

[☒] U.S. Mail
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